

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 10 January 2007**

**BALCA Case No.: 2005-INA-00062**  
ETA Case No.: P2000-CA-09508976/ML

*In the Matter of:*

**STAFFING SERVICES,**  
*Employer,*

*on behalf of*

**SERVANDO LOREDO,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco

Appearances: W. Kenneth Teebken, Esquire  
La Habra, California  
*For the Employer and the Alien*

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").<sup>1</sup> We base our decision on the record upon which the CO denied

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<sup>1</sup> This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

## **STATEMENT OF THE CASE**

On December 31, 1998, the Employer, Staffing Services, filed an application for alien labor certification on behalf of the Alien, Servando Loredó, to fill the position of Forklift Driver. (AF 147-148). The minimum requirements were listed as two years of experience in the job offered. The Employer received twelve applicant referrals in response to its recruitment efforts, all of whom were rejected as unqualified, uninterested, or unavailable for the position. (AF 153-154).

A Notice of Findings (NOF) was issued on October 31, 2002, citing the Employer's two-year experience requirement as unduly restrictive, and the Employer's recruitment effort as insufficient. (AF 66-69). The Employer agreed to amend the terms and conditions of the petition and to re-recruit. Accordingly, the case was remanded to the State Workforce Agency to supervise re-recruitment of the position with a minimum of three months of experience in the job offered. (AF 144).

The Employer received twenty applicant referrals in response to its re-recruitment, all of whom were rejected as either uninterested or unavailable for the position. (AF 75-77).

A second Notice of Findings (Second NOF) was issued by the CO on October 30, 2003, questioning the sufficiency of the Employer's recruitment efforts. (AF 63-65). Noting that the Employer had reported that "not one" of the applicants was found interested or available, (and that the Employer had reported similar results on its first recruitment effort), the CO concluded there was insufficient evidence establishing that the Employer made an effort to contact those applicants. The Employer was instructed to further document its recruitment efforts, including the submission of certified mail return receipts and phone bills.

In Rebuttal, the Employer resubmitted copies of its earlier rebuttal and recruitment reports, along with two pages of telephone records listing numbers for some of the applicant referrals. (AF 11-62).

A Final Determination denying labor certification was issued by the CO on April 7, 2004, based upon a finding of "Insufficient Recruitment Effort." (AF 10-10A). In denying certification, the CO concluded that the Employer had failed to provide any additional evidence to support its contention of good faith recruitment, specifically citing the lack of documentation through telephone calls since "most were to adjacent area codes and would have shown up on your telephone bills." (AF 10-10A).

The Employer filed a Request for Review by letter dated May 7, 2004, which the CO treated as a motion for reconsideration. The CO issued a Revised Final Determination on May 18, 2004. (AF 4-5). The CO again cited "insufficient recruitment effort" and found the two telephone bills submitted to be inadequate documentation because each was from a number other than that listed on the ETA 750A, and because the Employer did not designate which of the seventy listed calls were to the applicants. (AF 5). In addition, the CO noted that applicants 13 through 20 were "supposedly called May 21 but there [was] no bill for that time frame." (AF 5).

The Employer filed a Request for Review by letter dated July 6, 2004, and the matter was referred to this Office and docketed on October 13, 2004. (AF 1-3). On December 28, 2004, Employer submitted an "Appellant Brief." In this brief, the Employer's attorney stated that the telephone calls were made from his office, as a service to the Employer. The Employer's attorney stated that he was providing a new copy of the bills "with the non-relevant numbers blocked out." The telephone bills actually submitted, however, do not contain any blocked out information. (compare AF 37, 38, 45, 46). Finally, the Employer's attorney reported that the bill for May 21 had been misplaced, but that it had been ordered and would be provided as a supplement to the brief when received. The Board, however, has received no supplemental filings from the Employer or its attorney subsequent to the filing of the brief.

## **DISCUSSION**

Federal regulations at 20 C.F.R. § 656.21(b)(6) state that the employer is required to document that U.S. applicants were rejected solely for lawful, job-related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In the instant case, the Employer rejected a total of thirty-two applicants — all of the applicants who applied for the position during two recruitment periods.<sup>2</sup> During the second recruitment, the Employer's stated basis for rejection of each of the twenty applicants was that they did not show up for their scheduled interviews or that they were not interested in the job. In response, the CO requested documentation of actual contact and recruitment of the many qualified workers, including evidence that the Employer made "attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills)." In response, the Employer provided very little evidence.

The Employer was advised that the documentation of contact in hand was not convincing, yet the Employer's response in rebuttal was to do little more than copy two phone bills of unidentified numbers. There was no documentation identifying ownership of the numbers from

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<sup>2</sup> We take administrative notice that this same Employer's nine earlier appeals to BALCA exhibited substantially similar circumstances, i.e., significant numbers of apparently qualified U.S. applicants were all rejected, and little in the way of convincing documentation was submitted to establish that good faith efforts were made to contact those applicants. See *Staffing Services*, 2003-INA-41, 53, 54, 55, 86 (Sept. 17, 2003) (rejecting 50 U.S. applicants); *Staffing Services*, 2004-INA-95 (Feb. 2, 2006) (rejecting 48 U.S. applicants); *Staffing Services*, 2004-INA-102 (Jan. 12, 2006) (rejecting 17 U.S. applicants); *Staffing Services*, 2004-INA-107 (June 16, 2004) (rejecting 62 U.S. applicants); *Staffing Services*, 2004-INA-129 (June 16, 2004) (rejecting 45 U.S. applicants).

which the calls were placed and no identification on the bills submitted as to which of the seventy numbers included were pertinent to the CO's findings. Moreover, the Employer failed to submit phone records during a period of time when it supposedly telephoned a number of applicants.

The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.26(b)(4). *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (*en banc*). Under the controlling regulatory scheme, rebuttal following the NOF is the employer's last chance to make its case. *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Id.* Therefore, the additional documentation submitted by the Employer of its attempt to contact U.S. applicants submitted with the Request for Review and the Appeal Brief, cannot be considered by the Board on appeal. Even if we considered such evidence, it does not establish that the Employer engaged in good faith efforts to recruit applicants or that it lawfully rejected the 32 applicants.

Specifically, the Employer's attorney explained in the Appellant Brief that the phone number shown on the phone bills was a number other than that listed on the ETA 750A because the phone calls were made from the attorney's office. This information does not help the Employer's appeal; rather it would only have provided an additional ground for denial of the application. The regulations provide that the alien's agent or attorney may not interview or consider U.S. applicants unless the agent or attorney is also the employer's representative who normally interviews or considers applicants for job opportunities such as that offered, but which do not involve labor certification. 20 C.F.R. § 656.20(b). Section 656.20(b)(3)(ii), which limits who can represent the employer in interviews with U.S. applicants, applies only if the employer's attorney is also the alien's attorney under § 656.20(b)(3)(i). *Marcelino Rojas*, 1987-INA-685 (Mar. 11, 1988). In this case, Mr. Teebken was representing both the Employer and the Alien. (see Form G-28, at AF 72).

As noted above, the phone bills were not actually blocked out to show which numbers purportedly represented calls to U.S. applicants, and the March 21 bill was never provided to either the CO or this Board.

The burden of proof in the labor certification process is on the Employer. 20 C.F.R. § 656.2(b); *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). Failure to provide sufficient documentation of good faith recruitment efforts is grounds for denial. It is not the CO's responsibility to try and sort through Employer's numerous phone calls as listed on the bill submitted. In addition, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." Here, Employer has failed to provide such a record.

Inasmuch as Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers, *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*), we conclude that labor certification was properly denied. Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.